SUPREME COURT, U. S.

No. 74-1349

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

LOCAL 862, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTUAL IMPLEMENT WORKERS OF AMERICA, *Petitioner*

v.

FORD MOTOR COMPANY AND DOLORES MARIE MEADOWS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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FORD MOTOR COMPANY AND DOLORES MARIE MEADOWS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Local 862, International Union, UAW (hereafter Union), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra* p. 1a) appears at 510 F.2d 939. The opinion of the

District Court appears at 62 F.R.D. 98. The judgment of the District Court appears in App. B, *infra* p. 22a.

JURISDICTION

The judgment of the Court of Appeals (App. C, *infra* p. 24a) was entered on January 24, 1975, and rehearing was denied on March 24, 1975 (App. D, *infra* p. 26a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether in remedying Title VII violations by an employer discriminatorily refusing to hire women, District Courts may require the offending employer to hold harmless from pay losses in work reduction situations both the wronged discriminatees and the unoffending incumbent workers, instead of giving preferential seniority-layoff protection to either group of employees.

STATEMENT

This is a case of employment discrimination involving a question as vital to the future of Title VII as any yet presented to this Court since the statute's enactment a decade ago. Like many recent cases under Title VII, this case below presented a variety of questions concerning the scope of the class action, the prerequisites for individual back pay recoveries, the appropriate statute of limitations, etc. But after the EEOC filed an *amicus* brief in the Court of Appeals highlighting the question of retroactive seniority for discriminatees, the opinion of the Court reached the crucial issue: whether in ordering the hiring of a group of discriminatees courts should require that they be granted retroactive seniority which may cause the layoff in

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work reduction periods of incumbent employees who have long been earning their seniority protection. Faced with that same question the Fifth Circuit in *Franks,* which is here on grant of certiorari (No. 74-728), has ruled against retroactive or constructive seniority for the discriminatees. The Sixth Circuit in the present case expressly rejects the Fifth Circuit result, but remands the issue for District Court consideration of "policy questions" without guidance in their resolution. We urge grant of certiorari so the Court may consider a remedial alternative overlooked by the Fifth and the Sixth Circuit rulings, an alternative which avoids future layoff losses both for the discriminatees who should long ago have been hired with seniority protection and for the incumbent employees who have meanwhile been earning their seniority rights on the job. A brief review of the facts will set the case in proper perspective:

1. In October of 1969 the Ford Motor Company opened the Ford Truck Plant, a new production facility in Jefferson County, Kentucky. Among nearly one thousand initial employees hired for production jobs there were no women. Plaintiff Meadows was one of the women denied hiring soon after the plant opened. Having filed a complaint with the Equal Employment Opportunity Commission and having exhausted its procedures, Ms. Meadows in 1971 filed this class action against the Company and against UAW Local 862, the collective bargaining representative of the employees. The Complaint asserted that by a rule against hiring applicants weighing less than 150 pounds the Company was practicing sex discrimination. As late as 1973 there were still hardly any women on the work force, although there had been some 1,414 women among the

30,000 persons who had requested employment since the plant opened in 1969.[1]

2. On January 16, 1973, the District Court found in its ruling on plaintiff's summary judgment motion that the Company's weight rule excluded from hiring about 70% of women applicants but only 20% of the men, and that actually hiring exceptions had been made for some men who did not weigh 150 pounds. Finding that the weight limit operates in a sex-discriminatory fashion and that no business justification for the requirement was shown by the Company, the District Court granted summary judgment for the plaintiff enjoining the continued application of the weight standard. However, the Court's final judgment (*infra*, p 22a) provided no relief other than preferential hiring for the 31 rejected women applicants who had responded to a public notification ordered by the Court. The District Court denied them back pay on the ground that it could not determine with certainty that any particular woman applicant would have been hired but for the Company's sex-discriminatory rule. The Court also declined to provide them retroactive seniority, notwithstanding plaintiff's plea (Complaint, p. 5) for the "adjusted seniority" to which she and other discriminatees "would have been entitled" but for the wrongful denial of

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[1] Although the Complaint had alleged that UAW Local 862, petitioner herein, acquiesced in the Company's sex discrimination practice, the claim was not pursued with any evidentiary support. Accordingly, the District Court found that the Union had played no part in the hiring practice, and its final judgment (*infra*, p. 22a) dismissed with prejudice as to the Union. Nevertheless, that judgment was appealed without qualification and the Union was given the status of a party in the ensuing Court of Appeals proceedings (see *infra*, p. 10, n. 3).

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their hiring applications. Some of the 31 discriminatees have been hired pursuant to the District Court's judgment, but are currently vulnerable to layoff because their seniority does not date from their hiring rejections.

3. In the Court of Appeals the initial briefs of the parties focused chiefly on the back pay issue and on limits which the District Court had placed upon the class whose members would benefit from its decree. While plaintiff asserted (Br. for Plaintiff-Appellant, p. 7) that the District Court had "refused to consider seniority adjustment for hired class members", she went no further than to point out that since "the men hired in 1969 or 1970 are no longer in entry level jobs", she and other beneficiaries of the decree would be "required to start and remain at a competitive disadvantage with those male applicants who were unlawfully preferred by Ford in the period from 1969-1973" (*id.*, p. 19).

After the initial briefs were filed, the EEOC entered the case in the Court of Appeals with an *amicus* brief. Therein, the agency supported various claims made by the plaintiff and gave special emphasis to the seniority issue (Br. pp. 8-9). It asserted that by denying the seniority which plaintiff and her class "would have accrued" but for the Company's conduct, the District Court "failed to provide the full relief for victims of discrimination which Congress intended." Noting that seniority is "crucial" in determining whether a discriminatee will remain employed in any layoff situation, the EEOC urged (*id.*, pp. 10-11) that consistent with the Third Circuit's ruling in *Jurinko* (477 F.2d 1038) any discriminatee is entitled to be hired with a constructive or retroactive seniority date as of the time of her original rejection for employment. The

EEOC emphasized (*id.*, p. 12) that otherwise the discriminatees "will continuously suffer from less job security and poorer upward mobility than those men who filed applications at the same time and were hired, merely because they were prevented from commencing employment and accumulating seniority by Ford's discriminatory weight requirements." However, having so stated, the EEOC's brief then added a comment (p. 12, n. 9) concerning the difficult problem of the impact of a retroactive seniority grant on the existing work force:

> Nor will granting such seniority work injustice towards other employees previously hired. Such seniority merely allows the women an opportunity to compete for future job vacancies on the basis of their ability to perform and their adjusted seniority; it would not permit "bumping" of male incumbents from positions they presently occupy. *Bing* v. *Roadway Express, Inc., supra,* 485 F.2d at 450; *United States* v. *Hayes International Corp., supra,* 456 F.2d at 116; *Local 189, United Papermakers and Paperworkers* v. *United States, supra,* 416 F.2d at 988. Furthermore, the fact that some employees' expectations would be frustrated by the awarding of seniority adjustments does not stand in the way of such relief. ". . . Title VII guarantees that all employees are entitled to the *same* expectations regardless of 'race color, religion, sex, or national origin.' Where some employees now have lower expectations than their co-workers because of the influence of one of these forbidden factors, they are entitled to have their expectations raised even if the expectations of others must be lowered in order to achieve the statutorily mandated equality of opportunity." *Robinson* v. *Lorrillard Corp., supra,* 444 F.2d at 800 .

In this posture the seniority issue reached the Court below for disposition.

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4. The opinion by Judge Edwards for the Court of Appeals makes a lengthy analysis of the back pay issue and concludes that the District Court erred in refusing a back pay award. The Court then addresses the seniority problem but is apparently unable to resolve it. On the one hand, the Court remands for reconsideration the District Court's denial of retroactive seniority and goes so far as to disapprove the Fifth Circuit decisions —including *Franks*—which have that result. On the other hand, the Court emphasizes that "the burden of retroactive seniority for determination of layoffs would fall directly upon other workers who have themselves had no hand in the wrongdoing found by the District Court." In sum, the Court returns the seniority question to the District Court for its consideration of "the policy questions involved," offering its own meager guidance in the following terms (*infra*, pp. 19a-21a):

> Whatever the difficulties of determining back pay awards, the award of retroactive job seniority offers still greater problems. Seniority is a system of job security calling for reduction of work forces in periods of low production by layoff first of those employees with the most recent dates of hire. It is justified among workers by the concept that the older workers in point of service have earned their retention of jobs by the length of prior services for the particular employer. From the employer's point of view, it is justified by the fact that it means retention of the most experienced and presumably most skilled of the work force. Obviously, the grant of fully retroactive seniority would collide with both of these principles.
>
> In addition, where the burden of retroactive pay falls upon the party which violated the law, the burden of retroactive seniority for determination

of layoff would fall directly upon other workers who have themselves had no hand in the wrongdoing found by the District Court.

There is, however, no prohibition to be found in the statute we construe in this case which prohibits retroactive seniority and, of course, the remedy for the wrong of discriminatory refusal to hire lies in the first instance with the District Judge. For his guidance on this issue we observe, however, that a grant of retroactive seniority would not depend solely upon the existence of a record sufficient to justify back pay under the standards of the Back Pay Section of this opinion. The court would, in dealing with job seniority, need also to consider the interests of the workers who might be displaced as well as the interests of the employer in retaining an experienced work force. We do not assume, as our brethren in the Fifth Circuit appear to (*Local 189, AFL-CIO, GLC* v. *United States*, 416 F.2d 980, *cert. denied*, 397 U.S. 919 (1970)), that such reconciliation is impossible, but as is obvious, we certainly do foresee genuine difficulties. See also *Jurinko* v. *Edmon L. Wiegand Co.*, 477 F.2d 1038 (3d Cir.), *vacated*, 414 U.S. 971 (1973), *reinstated*, — F.2d —, 7 FEP 787 (3d Cir. 1974). Cf. Local 189, *supra*; *Franks* v. *Bowman Transportation Co.*, 495 F.2d 398 (5th Cir. 1974).

On remand the District Judge may desire to hear the policy questions involved in this problem before remanding the individual claims to the Master. For purposes of that hearing notice should be given to the employees likely to be affected and intervention should be allowed from appropriate representatives.

What we have said concerning job seniority does not, of course, apply to the fringe benefits of employment. Where vacation schedules or pension

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> rights (or other fringe benefits) are determined by date of hire, we perceive no reason why that date in these cases should be other than the date which the trial court fixes as the date when the employee would have been hired, absent the illegal hiring practice which the District Court has identified and enjoined.

5. Unlike the Fifth Circuit's ruling in *Franks*, which is pending on certiorari before this Court, the ruling by the Sixth Circuit in the present case declines to conclude that "reconciliation is impossible" between the seniority-layoff protection of the incumbent workers and those of a class of discriminatees ordered to be hired by a District Court decree under Title VII. But the Court returns the issue to the District Court essentially without guidance or assistance in the concededly difficult task. While rejecting the Scylla-Charybdis assumption espoused by the *Franks* ruling in its preference for the incumbent employees, the Sixth Circuit provides no workable alternative. And in a more recent ruling the same Court again avoids the issue, declining on procedural grounds to grant retroactive seniority to discriminatees. *EEOC* v. *Detroit Edison Co.*, — F.2d —, 10 FEP Cases 239, 250.

However, there is an alternative, originally suggested by scholarly analyses of Title VII, which does not threaten the layoff either of incumbent workers or newly hired discriminatees.[2] That is the "front pay" remedy which requires the wrongdoing employer to hold both groups harmless from layoff losses in work

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[2] See Cooper and Sobol, "Seniority and Testing Under Fair Employment Laws," 82 Harv. L. Rev. 1598, 1678-1679 (1969); Blumrosen, "Seniority and Equal Employment Opportunity", 23 Rutgers L. Rev. 268, 305-307, 311-312 (1969).

reduction situations. We proceed to urge the grant of concurrent review with *Franks*, for consideration of a viable alternative to the seniority-layoff impasse which that Court resolved against the discriminatees and the Court below was unable to resolve.

REASON FOR GRANTING THE WRIT

Concurrent Review Should Be Granted with Franks (No. 74-728) for Consideration of a Viable Alternative to the Seniority-Layoff Impasse Which the Fifth Circuit Resolved Against the Discriminatees and the Court Below Was Unable To Resolve

Following grant of certiorari on a question of public importance this Court has frequently granted concurrent review in companion cases presenting related and illuminating aspects of the same question. See, e.g., *Brown* v. *Board of Education*, 344 U.S. 1 (1952). We urge that course here because the limited contentions in *Franks* may foreclose approval of the best remedy available in that case as well as this. Concurrent consideration with *Franks* will help to illuminate a major remedial option which neither circuit court seems to have recognized: a remedy which requires the wrongdoing employer to protect from layoff losses both those against whom he discriminated and his incumbent employees, rather than subjecting either group to wage losses in work reduction situations.[3]

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[3] In this case the brief *amicus* by the EEOC emphasized the seniority rights issue and the Court of Appeals reached that issue in its opinion. Since the issue directly affects the rights of the incumbent workers who are members of the UAW and are represented by it in collective bargaining, the Union is here a proper party to invoke review. In like circumstances this Court has granted intervention to affected third parties not previously in the case, so as to permit their filing of certiorari petitions. See *Banks* v. *Chicago Grain Trimmers*, 389 U.S. 913; *Hunter* v. *Ohio*, 396 U.S. 879. In the present case no leave for intervention is

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This Court's timely consideration of that remedy is vitally necessary. The Court doubtless perceived last term during its consideration of *DeFunis* (416 U.S. 312) the undesirable character of remedies for past discrimination which throw the burden either upon the wronged minority or upon other blameless citizens. If in the employment area there is a better solution, surely it should be preferred over one which is unjust either to the discriminatee or the incumbent worker. Thus, if the discriminatees are hired without the same protection against losses in work reduction situations which they would have had but for their employment rejection, the key Congressional purpose to provide full Title VII remediation is frustrated. As the Conference Committee emphasized (see 118 Cong. Rec. 7168) section 706(g) is intended to assure "that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." A recent article which describes layoff of women who were hired at

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needed to permit the filing of this petition because the Union is already a party in the case. Although the District Court dismissed the Union, it was thereafter captioned as a defendant-appellee in all briefs in the Court of Appeals as well as in the opinion of that Court; it was given notice of all proceedings; it requested leave to appear by letter of May 20, 1974 from counsel Segal to James A. Higgins, Clerk, and participated in the oral arguments; and it filed a petition for rehearing which was entertained by the Court of Appeals. Finally, that Court expressly recognized (p. 19) that "employees likely to be affected" by the disposition of the seniority problem have a right to participate by "appropriate representatives." Since the Union is such a representative and a recognized party in the Court below, it properly presents this petition addressed to that Court's treatment of the vital senioriy issue.

General Motors because of alleged past sex discrimination, dramatically shows how illusory may be a "remedy" which provides no layoff protection to discriminatees. See App. E, *infra* p. 27a. Given this Court's definitive ruling in *Swann* (402 U.S. 1, 26) that to remedy school segregation there must be desegregation in actuality rather than mere theory, we cannot believe that in the employment area this Court would affirm the ruling in *Franks* which may leave the discriminatee without job or pay.

On the other hand it would also be unjust if, after years spent in earning seniority on the job, the faultless incumbent employees were subjected to layoff in favor of discriminatees hired with seniority retroactive to the time when they were denied hiring. Only last year a majority of this Court declined to put the desegregation burden upon suburban school districts "not shown to have committed any constitutional violation." *Milliken* v. *Bradley,* 418 U.S. 717, 745. Considering that the incumbent employees are in no way at fault for the employer's Title VII violation, a remedy which corrects the employer's wrongdoing at the expense of those employees is unjust and unwise.

Accordingly, we will urge for the Court's consideration a third and better option, which requires that following reinstatement of discriminatees the offending employer hold harmless against layoff losses both the discriminatees and his incumbent employees hired after the discriminatees' original rejection from employment. That remedy properly puts the full burden upon the wrongdoer rather than his victims or other unoffending employees. It is a familiar rule of law that the full remedial burden shall be on the offending party. Such seminal decisions as *Storey Parchment*

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(282 U.S. 555) and *Bigelow* (327 U.S. 251) apply the rule as between the wrongdoer and his victim. The rule equally applies as between the wrongdoer and third parties; where the wrongdoer has done intentional harm he is liable to third parties as much as to the immediately injured party, because "having departed from the social standard of conduct, he is liable for the harm which follows from his act" (Prosser, Law of Torts, 4th ed., p. 33). Thus there is every reason of equity and justice for placing the full burden upon the employer who violated Title VII, requiring him to protect both the discriminatees and his incumbent work force against layoff losses in periods of work reduction. The save harmless remedy would operate, of course, only in the area of overlapping seniority between discriminatees and incumbents with less seniority; when an entire plant shuts down or layoff reaches up the seniority ranks beyond the date when the discriminatees were wrongfully rejected for hiring, the normal rules would apply and no member of either group could claim protection against layoff.[4]

No more than avoiding the increased cost of "back pay" to discriminatees, should employers who violate Title VII avoid the cost of "front pay" in layoff situations. Indeed, the latter may be the lesser burden, since employers have a variety of available means to cushion future wage obligations which they do not have in meeting accrued back pay required by a Title VII

[4] If it is suggested that the employer's save harmless duty guarantees pay to both groups but not necessarily the work itself, we would respond with the common observation that employers find work for employees whom they must pay. However, if reduction in the work force may actually sometimes become necessary then many employees may themselves opt for layoff with pay, and for any others equitable arrangements can be made.

decree. Faced with restrictions on layoff actions, employers can reduce new hiring, encourage retirement, or otherwise hedge against employee idle time by adjustments made through the established collective bargaining process. In cases where employers are required to "red circle" some of their employees they have developed a variety of means for meeting the extra costs, sometimes even by ultimate resort to price increases. While we would not welcome that recourse, it still seems a preferable result that society at large finance the correction of massive and historical social wrongs rather than innocent individual workers and families least able to absorb the costs of social reform.

In sum, the seniority impasse in Title VII cases is neither as inexorable as the Fifth Circuit holds in *Franks* nor as difficult as the Sixth Circuit suggests in its present ruling. Grant of review will permit us to demonstrate that the seniority rights of all can be safely preserved by measures of judicial relief which place the full economic burden on the wrongdoing employer whose actions created the remedial issue. Surely on a matter of such import this Court will want to consider a remedy which does not make one group of workers bear the burden for securing the rights of other equally blameless employees.

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CONCLUSION

For the reason stated the writ should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

Nos. 74-1258-59

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DOLORES MARIE MEADOWS,
Plaintiff-Appellant, Cross-Appellee,

v.

FORD MOTOR COMPANY,
Defendant-Appellee, Cross-Appellant,

LOCAL 862, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA; and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *Defendants-Appellees.*

APPEAL *from the United States District Court for the Western District of Kentucky, Louisville Division*

Decided and Filed January 24, 1975

Before: EDWARDS and MILLER, Circuit Judges, and McALLISTER, Senior Circuit Judge.

EDWARDS, Circuit Judge. Plaintiff appeals from the denial of back pay and retroactive seniority after the District Court for the Western District of Kentucky had found that she and the class of women job applicants she represents had been denied jobs, in violation of the prohibition against sex discrimination in employment contained in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-15 (1970), *as amended*, 42 U.S.C. §§ 2000e to 2000e-17 (Supp. II, 1972). She also claims that the class involved was unduly restricted by the District Judge and that he ordered an inadequate amount of attorney fees.

This controversy arose when defendant Ford Motor Company began hiring employees for a new Ford Truck Plant

in Jefferson County, near Louisville, Kentucky. Plaintiff Meadows applied for a production line job on October 10, 1969. She was not hired and heard nothing concerning her application but learned that Ford had hired over 900 men and no women. She then filed a charge of discrimination before the Equal Employment Opportunity Commission on January 14, 1970, alleging that the Ford Motor Company and Local 862, UAW [1] were discriminating against her and other women similarly situated. The EEOC issued her a notice of right to sue and plaintiff Meadows filed this action in the District Court alleging that Ford employed a 150 lb. limitation on production line hires so as to eliminate women.

The case was heard by discovery and the taking of depositions. The District Judge entered findings of fact and conclusions of law on August 29, 1973, and followed by a final judgment which recorded his critical holdings as follows:

> 2. There are thirty-one (31) members of the Class represented by the Plaintiff in the instant action; the names, address and telephone numbers of the said members of the class are attached hereto and made a part hereof as if fully copied herein.
>
> 3. The use by the Defendant under the circumstances before the Court of the 150 pound weight requirement for eligibility for employment on its production line at its Kentucky Truck Plant constitutes an unlawful employment practice pursuant to the terms of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1 et seq. (sic).
>
> 4. Neither the Plaintiff nor any member of the class is entitled to any award of damages. Plaintiff is awarded its costs herein expended and counsel fees in the sum of $11,500.00.

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[1] Local 862, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America.

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5. The Defendant, Ford Motor Company, be and hereby is permanently enjoined and prohibited from applying the 150 pound weight requirement for eligibility for employment on its production line at its Kentucky Truck Plant.

6. The names of the Plaintiff and the thirty-one (31) members of the class represented by the Plaintiff shall be placed by the Defendant in a priority employment pool in the order of the dates of their original application for production employment. The names of all other applicants for production employment are to be placed in a general pool in accordance with the present practice of Defendant. As production employment positions become available, Defendant shall select names from the two pools of applicants at a set ratio of one name from the priority pool for every three names from the general pool, and these individuals are to be notified by the Defendant of the job openings as they occur and given a reasonable opportunity to appear for a pre-employment physical examination and the other processes regularly required of such applicants.

The District Judge defined the class of plaintiffs as those women who had applied for jobs at the Kentucky Truck Plant between April 1, 1971, and April 13, 1972, and who were refused jobs.

The District Judge also retained jurisdiction of the case to supervise implementation of his judgment.

The record showed that the two union defendants exercised no control over Ford hiring practices and the case as to them was dismissed by the District Court. No appeal was taken from this decision.

The Ford Motor Company waived its appeal from the portion of the District Judge's judgment finding it guilty of discriminatory practices and requiring it to terminate

them and to establish a priority system for offering employment to some 31 identified discriminatees.

On this appeal we deal only with plaintiffs' complaints 1) that the District Judge's judgment by refusing back pay and retroactive seniority failed to make them whole and failed to deter similar discrimination in the future, 2) that the District Judge defined the class of discriminatees too narrowly, and 3) that the attorney fees awarded did not consider all of the work performed in this litigation.

Back Pay

The District Judge's reasoning on the back pay issue is set forth in an opinion as follows:

> However, having determined that liability for discrimination exists is not the same as finding that an award of money damages is in order. Indeed, the Court has found absolutely no authority for awarding money damages in a case like the present one. Under the relevant statute, 42 U.S.C. § 2000e(5), (sic) the only money damages that can be awarded are in the form of back pay. No court whose decision has been reported has been willing to award back pay to a group of persons who were never in the employ of the employer-defendant in the first place. Back pay has been awarded in cases of discriminatory refusal to promote or to transfer, and to some individuals who were discriminatorily denied jobs in the first instance, but in all of these situations, the amount of speculation as to just who was damaged and how much has been minimal. For instance, in the case of Bowe v. Colgate, 416 F. 2d 711 (C.A. 7, 1969), it was quite clear as to which persons were damaged and how they should be compensated. That is not the case here. Assuming that the class of plaintiffs can be more or less exactly defined, there is no way to calculate which of them would have been hired, or when, or what other circumstances

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> would have intervened in the meantime. In other words, there is no basis on which an award in any amount can be justified. Although all reductions of legal injury to money damages are somewhat speculative, in other cases, the damaged party is absolutely identified, which is not the case here. The fact that Ford has been found guilty of sexual discrimination does not mean that it must pay whatever damages to which the Plaintiff believes that she is entitled. Unless the Court is directed to some authority to the contrary, it does not intend to make an award of money damages in this case.

The District Judge also entered the following conclusion of law:

> 6. The Court, being unable to determine from the records when plaintiff or any members of her class would have been employed, had it not been for the discriminatory practices of the defendant, concludes that it is without authority to award any backpay or any monetary damages to plaintiff or any members of her class. The only cases in which backpay has been awarded to a potential employee, who was discriminated against and not employed, are those involving individual employees where it was definitely shown that they would have been entitled, on a date certain, to be employed and after computation could be made of the wages to which they were entitled. See Gates v. Georgia Pacific Corporation, 326 F. Supp. 397 (D.C. Ore. 1970). Any award of damages in this case, therefore, would be speculative and must be denied.

We believe the District Judge was in error in concluding that the difficulties of ascertaining the amount of damages suffered deprived him of authority to award back pay. The statute relating to back pay is 42 U.S.C. § 2000e-5(g)

(1970). The statutory language extant at the time this suit was filed was:

> (g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 704(a). 42 U.S.C. § 2000e-5(g) (1970).

The statute was reenacted in 1972, effective for all charges then pending with the EEOC, so as to add a statute of limitations providing that, "Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission." 42 U.S.C. § 2000e-5(g) (Supp. II, 1972), *amending*, 42 U.S.C. § 2000e-5(g) (1970).

The legislative history of this provision is also illuminating:

> *Section* 706(g)—This subsection is similar to the present section 706(g) of the Act. It authorizes the

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court, upon a finding that the respondent has engaged in or is engaging in an unlawful employment practice, to enjoin the respondent from such unlawful conduct and order such affirmative relief as may be appropriate including, but not limited to, reinstatement or hiring, with or without back pay, as will effectuate the policies of the Act. Back pay is limited to that which accrues from a date not more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the aggrieved person(s) would operate to reduce the backpay otherwise allowable.

The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but *also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.* 118 Cong. Rec. 7168 (1972) (Conference Report) (Emphasis added.)

We approach decision of this issue, keeping in mind the classic treatment of the damage issue by the United States Supreme Court in the *Story Parchment Co.* case:

> Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may

not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise. *Eastman Kodak Co.* v. *Southern Photo Co.*, 273 U.S. 359, 379. Compare *The Seven Brothers*, 170 Fed. 126, 123; *Pacific Whaling Co.* v. *Packers' Assn.*, 138 Cal. 632, 638. As the Supreme Court of Michigan [*Gilbert* v. *Kennedy*, 22 Mich. 117, 130 (1871)] has forcefully declared, the risk of the uncertainty should be thrown upon the wrongdoer instead of upon the injured party.

* * *

"To deny the injured party the right to recover any actual damages in such cases, because they are of a nature which cannot be thus certainly measured, would be to enable parties to profit by, and speculate upon, their own wrongs, encourage violence and invite depredation. Such is not, and cannot be the law, though cases may be found where courts have laid down artificial and arbitrary rules which have produced such a result." *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 563-64 (1931).

We recognize, of course, that the words were spoken in the context of tort cases. But in tort and in discrimination cases the basic objective of damages is the same—to make the injured party whole to the extent that that can be done.

We also recognize that to some extent we write on a clean slate. No case exactly in point has been cited to us and we have found none. Most of the case law in which back pay awards have been granted because of unlawful discrimination in employment practices have involved either illegal discrimination (via discharge or failure to promote) against

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employees who were union members or adherents[1a] or against employees who were Negroes.[2]

Here, of course, we deal with a record showing discrimination against *women* in *hiring* practices. Congress, however, appears to have modeled the remedial features of Title VII upon the National Labor Relations Act. *See* 110 Cong. Rec. 6549 (1964) (remarks of Sen. Humphrey). *See generally* Davidson, *"Back Pay" Awards Under Title VII of the Civil Rights Act of* 1964, 26 Rut. L. Rev. 741 (1973); Note, *Equal Employment Opportunity: The Back Pay Remedy Under Title VII* 1974 U. Ill. L. For. 379 (1974). In addition, the prohibition against sex discrimination is contained in the same sentence of Title VII as the prohibition against race discrimination. 42 U.S.C. § 2000e-2 (1970), *as amended*, 42 U.S.C. § 2000e-2 (Supp. II, 1972). We believe, therefore, that the great amount of case law mandating back pay awards in these two situations which we have just cited is strong precedent for our instant case.

In this regard we find the leading Supreme Court case on back pay awards occasioned by illegal union discrimination in hiring practices to be instructive:

> *Second.* Since the refusal to hire Curtis and Daugherty solely because of their affiliation with the Union was an unfair labor practice under § 8(3), the remedial authority of the Board under § 10(c) became operative.

[1a] *See, e.g., NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344 (1953); *Radio Officers* v. *NLRB*, 347 U.S. 17 (1953); *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 (1941).

[2] *See, e.g., Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870 (6th Cir. 1973); *Thorton* v. *East Texas Motor Freight*, 497 F.2d 416 (6th Cir. 1974); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974); *Moody* v. *Albemarle Paper Co.*, 474 F.2d 134 (4th Cir. 1973), *cert. granted*, 43 U.S.L.W. 3344 (U.S. Dec. 16, 1974) (No. 74-389); *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971).

Of course it could issue, as it did, an order "to cease and desist from such unfair labor practice" in the future. Did Congress also empower the Board to order the employer to undo the wrong by offering the men discriminated against the opportunity for employment which should not have been denied them?

Reinstatement is the conventional correction for discriminatory discharges. Experience having demonstrated that discrimination in hiring is twin to discrimination in firing, it would indeed be surprising if Congress gave a remedy for the one which it denied for the other. The powers of the Board as well as the restrictions upon it must be drawn from § 10(c), which directs the Board "to take affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." It could not be seriously denied that to require discrimination in hiring or firing to be "neutralized," *Labor Board* v. *Mackay Co.*, 304 U.S. 333, 348, by requiring the discrimination to cease not abstractly but in the concrete victimizing instances, is an "affirmative action" which "will effectuate the policies of this Act." Therefore, if § 10(c) had empowered the Board to "take such affirmative action as will effectuate the policies of this Act," the right to restore to a man employment which was wrongfully denied him could hardly be doubted. Even without such a mandate from Congress this Court compelled reinstatement to enforce the legislative policy against discrimination represented by the Railway Labor Act. *Texas & N. O. R. Co.* v. *Railway Clerks*, 281 U.S. 548. Attainment of a great national policy through expert administration in collaboration with limited judicial review must not be confined within narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies. Compare *Virginian Ry.* v. *Federation*, 300 U.S. 515, 552. To differentiate between discrimination in denying em-

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ployment and in terminating it, would be a differentiation not only without substance but in defiance of that against which the prohibition of discrimination is directed.

But, we are told, this is precisely the differentiation Congress has made. It has done so, the argument runs, by not directing the Board "to take such affirmative action as will effectuate the policies of this Act," *simpliciter*, but, instead, by empowering the Board "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." To attribute such a function to the participial phrase introduced by "including" is to shrivel a versatile principle to an illustrative application. We find no justification whatever for attributing to Congress such a casuistic withdrawal of the authority which, but for the illustration, it clearly has given the Board. The word "including" does not lend itself to such destructive significance. *Helvering* v. *Morgan's, Inc.*, 293 U.S. 121, 125, note. *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 187-89 (1941).

The leading case in this circuit upon the award of back pay was written by Judge Miller in the context of a race discrimination case involving promotional opportunities:

The finding of discrimination by the district court, in addition to the nature of the relief (compensatory as opposed to punitive), and the clear intent of Congress that the grant of authority under Title VII should be broadly read and applied mandate an award of back pay unless exceptional circumstances are present.

Congress evidently intended that the award of back pay should rest within the sound discretion of the trial judge. Although appellate courts are loathe to interfere with the exercise of such discretion by a trial court, it is recognized that it is not free from appellate scrutiny. In

Moody v. Albemarle Paper Co., 474 F.2d 134, 141 (4th Cir. 1973), [*cert. granted*, 43 U.S.L.W. 3344 (U.S. Dec. 16, 1974) (No. 74-389)] the Fourth Circuit said:

> Discretion in a legal sense necessarily is the responsible exercise of official conscience on all the facts of a particular situation in the light of the *purpose for which the power exists*. Bowles v. Goebel, 151 F.2d 671, 674 (8th Cir. 1945) (emphasis added). Thus in determining the proper scope of the exercise of discretion, the objective sought to be accomplished by the statute must be given great weight. Hecht Co. v. Bowles, 321 U.S. 321, 331, 64 S.Ct. 587, 88 L.Ed. 754 (1944). Where a district court fails to exercise discretion with an eye to the purposess of the Act, it must be reversed. Wirtz v. B. B. Saxon Co., 365 F.2d 457 (5th Cir. 1966); Shultz v. Parke, 413 F.2d 1364 (5th Cir. 1969).

We find no reasonable basis for denial of such relief on the present record. The 1968 change in Timken's seniority system does not ameliorate the injury already suffered. Good faith by Timken either during the 1965-68 period or thereafter is not a valid defense to a claim for back pay. The Court in Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972), went to great lengths to emphasize the good faith of the defendant. Nevertheless, the court remanded the case, stating that the district court on reconsideration "will of course, include the appropriate remedy, back pay, limited or full, etc., as needed to effectuate the Act." Id. at 360. *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870, 876-77 (6th Cir. 1973). (Footnote omitted.)

See also Thornton v. East Texas Motor Freight, 497 F.2d 416 (6th Cir. 1974).

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Other circuits have reached similar results. Thus in the *Georgia Power* case the Fifth Circuit said:

> 2. *Equitable Discretion*
>
> Title VII was enacted with the legislative objective of disestablishing the racial and sexual caste systems which had remained ingrained in the American economy since slavery and coverture. The Act, in authorizing courts to grant equitable relief to those who might be injured by its breach, expressly and impliedly includes the discretion to award back pay. Given this court's holding that "[a]n inextricable part of the restoration to prior [or lawful] status in the payment of back wages properly owing to the plaintiffs", Harkless v. Sweeny Independent School District, 427 F.2d 319, 324 (5th Cir. 1971), it becomes apparent that this form of relief may not properly be viewed as a mere adjunct of some more basic equity. It is properly viewed as an integral part of the whole of relief which seeks, not to punish the respondent but to compensate the victim of discrimination. *See* NLRB v. J. H. Rutter-Rex Mfg. Co., 396 U.S. 258, 90 S.Ct. 417, 24 L.Ed.2d 405 (1969); Oil, Chemical and Atomic Workers, Inc. (sic) Union v. N.L.R.B., Part III, 144 U.S.App.D.C. 167, 445 F.2d 237 (1971). *Cf.* Social Security Board v. Nierotko, 327 U.S. 358, 66 S.Ct. 637, 90 L.Ed. 718 (1946).[19]
>
> *United States* v. *Georgia Power Co.*, 474 F.2d 906, 921 (5th Cir. 1974).

And the Fourth and Seventh Circuits have given an even broader reading to Title VII back pay entitlement in *Moody*

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[19] The relief provisions of Title VII were derived for a similar provision in the National Labor Relations Act, 29 U.S.C.A. § 160(c). Monetary awards by the National Labor Relations Board under this authority have been based upon net back pay, and legislative history indicates that Congress felt that the Title VII remedy should be similar. 110 Cong. Rec. 6549 (1964); Developments — Title VII, [84 Harv. L. Rev. 1109] *supra* note 8, at 1259 *n.* 349.

v. *Albemarle Paper Co.*, 474 F.2d 137 (4th Cir. 1973), *cert. granted*, 43 U.S.L.W. 3344 (U.S. Dec. 16, 1974) (No. 74-389); *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969).

In the *Pettway* case Judge Tuttle examined the practical problems of awarding back pay in another race discrimination case involving promotion rights in language which we commend to the attention of the District Judge on remand of our instant case:

> 3. *Determination of the award.* Having decided that the district court should grant back pay to the members of the class, a multitude of questions arise concerning the period of time encompassed by the back pay, the burden of proof, and the mechanics of computation. Some guidelines for the district court will be set forth.
>
> Initially, we approve the district court's intention of referring the back pay claims to a Special Master, Fed. R.Civ.P. 53. United States v. Wood, Wire & Metal Lathers Int. Union, Local 46, 328 F.Supp. 429, 441 (S.D. N.Y. 1971). However, the court and the parties may also consider negotiating an agreement. *E.g.*, Johnson v. Goodyear Tire & Rubber Co., 349 F.Supp. 3, 18 (S.D. Tex. 1972), 491 F.2d 1364 (5th Cir. March 27, 1974); United States v. Wood, Wire & Metal Lathers, Int. Union, Local 46, *supra* 328 F.Supp. at 444 n. 3. An alternative is to utilize the expertise of the intervening Equal Employment Opportunity Commission to supervise settlement negotiations or to aid in determining the amount of the award.
>
> * * *
>
> This Court has recently addressed the issue of the burden of proof on back pay claims in Johnson v. Goodyear Tire & Rubber Co., *supra*, 491 F.2d 1364. This Court pointed out that once a prima facie case of discrimination against the class alleged is made out, a presumption for back pay arises in favor of class members. However, this presumption was found to be tem-

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pered by an initial burden on the individual employee to bring himself within the class and to describe the harmful effect of the discrimination on his individual employment postion:

> "Therefore, the class represented by Johnson, having established a prima facie case of employment discrimination, is presumptively entitled to back pay. . . . Since, at the same time, the initial burden is now placed on the individual labor department employee to show that he is a member of the recognized class subject to employment discrimination, we think it is appropriate to offer some preliminary observations concerning the manner in which the presumption in favor of the class and the initial burden placed upon an individual employee may be reconciled by the district court.
>
> * * *
>
> "The district court's task will be further complicated since the only criteria which Goodyear previously imposed for transfer have been found by this court to be invalid under Title VII. If an employee can show that he was hired into the labor department before April 22, 1971 and was subsequently frozen into the department because of the discriminatory practices established here, then we think the individual discriminatee has met his initial burden of proof unless there are apparent countervailing factors present." *Id.* at 1379.

This holding is entirely consistent with, and flows from our decision in *Georgia Power* that the presumption in favor of a member of a class discriminated against does not *per se* entitle an employee to back pay without some individual clarification. 474 F.2d at 921-922.

This Court in *Goodyear,* then went on to detail the burden on the employer:

> ". . . It will be incumbent upon Goodyear to show by convincing evidence that other factors would have

prevented his transfer regardless of the discriminatory employment practices. If Goodyear wishes to show that a labor department employee would not be qualified for any other job then its proof must be clear and convincing. Any doubts in proof should be resolved in favor of the discriminatee giving full and adequate consideration to applicable equitable principles." Id. at 1379, 1380.

There, just as in this case, our prior decision in Cooper v. Allen, *supra*, 467 F.2d at 840, was instructive. In *Cooper*, the district court had placed the burden on the plaintiff to show, disregarding the discriminatory testing, that he was the most qualified for the job which he was seeking back pay. This Court reversed:

> "On remand the City must prove by clear and convincing evidence that, in the light of the enumerated qualifications, Cooper would not have been entitled to the job even had there been no requirement to take and pass the Otis test. That is, the City must show that the person actually hired was on the whole better qualified for the job." *Id.* at 840.

Reading these earlier decisions together, it is clear that the burden of proof formulated by this Court conceives an initial lighter burden on the back pay claimant with a heavier weight of rebuttal on the employer. Therefore, the *maximum* burden that could be placed on the individual claimant in this case is to require a statement of his current position and pay rate, the jobs he was denied because of discrimination and their pay rates, a record of his employment history with the company and other evidence that qualified or would have qualified him for the denied positions, and an estimation of the amount of requested back pay. The employer's records, as well as the employer's aid, would be made available to the plaintiffs for this purpose. The

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burden then shifts to the company to challenge particular class members' entitlement to back pay. *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 258-60 (5th Cir. 1974). (Footnotes omitted.)

Judge Tuttle continued then to discuss the complexity of a back pay award in a discrimination case involving denial of promotions. He then turned to the ingredients of back pay and his conclusion:

> Finally, the ingredients of back pay should include more than "straight salary." Interest, overtime, shift differentials, and fringe benefits such as vacation and sick pay are among the items which should be included in back pay. Adjustment to the pension plan for members of the class who retired during this time should also be considered on remand.
>
> *Conclusion*
>
> The declaratory and affirmative injunctive relief should alleviate the perpetuated effects of the company's intentional discrimination and testing and educational requirements. Back pay should compensate for economic losses suffered during the period of testing and before the implementation of this decision. Nevertheless, two additional elements of relief are necessary. The district court should establish a complaint procedure by which a member of the class may question the interpretation or implementation of the district court's decree. *See* United States v. Georgia Power, *supra*, C.A. Nos. 12355, 11723, 12185. The procedure should include the filing of a complaint with the personnel department of the company and the proper committee of the Board of Operatives (described *infra*). Finally, the district court should retain this case on the docket for a reasonable time to insure the continued implementation of equal employment opportunities. Brown v. Gaston County Dyeing Machine

Co., *supra*, 457 F.2d at 1383; Parham v. Southwestern Bell Telephone Co., *supra*, 433 F.2d at 429. *Pettway* v. *American Cast Iron Pipe Co., supra* at 263-64. (Footnotes omitted.)

Additionally, we note that two circuits have already entered orders requiring affirmative action to make whole parties who have been discriminatorily refused employment at the hiring office. In a very recent case the Fifth Circuit said:

> The remedies authorized in Title VII specifically include back pay. As indicated above, the purpose of Title VII is to make the discriminatee whole and eliminate the effects of past discrimination as far as possible. Where the discriminatee has suffered economic injury in the form of lost wages, back pay is normally appropriate relief. Harkless v. Sweeny Independent School District, 5th Cir. 1970, 427 F.2d 319, 324. *Franks* v. *Bowman Transportation Co.*, 495 F.2d 398, 421 (5th Cir 1974).

See also, Moody v. *Albemarle Paper Co.*, 474 F.2d 134 (4th Cir. 1973), *cert. granted*, 43 U.S.L.W. 3344 (U.S. Dec. 16, 1974) (No. 74-389).

As we have already indicated, we believe that the District Judge erred in holding that he was without authority to enter back pay awards to the discriminatees before him. In addition to the injustice to the victims of illegal discrimination, such a policy prohibiting back pay because of the difficulty of computing it actually would encourage employers who had the inclination to disregard this act to do so with impunity, knowing that in the end the worst could happen to them is that they might be ordered to hire women wholly prospectively. We recognize the practical difficulties of determining that actual damage has occurred. The initial burden of proof rests upon the job claimant to establish that she sought employment and that she was eligible for a then-

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existing job. She can, of course, take advantage of Ford employment records in establishing a prima facie case. At this point the burden would then shift to Ford to show a legitimate business reason for the job refusal. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

Assuming that eligibility for back pay was ascertained within the realm of reasonable probability (and no more can be asked here), evidence would also have to be taken pertaining to mitigating of damages because some of these claimants may have secured work in the meantime.

Reference of these back pay claims to a Special Master and pretrial conferences before him to narrow the fact disputes which need actual testimony are practical answers to some of the problems presented by claims for back pay awards.

If eligibility and discriminatory refusal are established, then back pay should be fully awarded, including compensation for fringe benefits then enjoyed by employees. See *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 263 (5th Cir. 1974).

Seniority

Whatever the difficulties of determining back pay awards, the award of retroactive job seniority offers still greater problems. Seniority is a system of job security calling for reduction of work forces in periods of low production by layoff first of those employees with the most recent dates of hire. It is justified among workers by the concept that the older workers in point of service have earned their retention of jobs by the length of prior services for the particular employer. From the employer's point of view, it is justified by the fact that it means retention of the most experienced and presumably most skilled of the work force. Obviously, the grant of fully retroactive seniority would collide with both of these principles.

In addition, where the burden of retroactive pay falls upon the party which violated the law, the burden of retroactive seniority for determination of layoff would fall directly upon other workers who have themselves had no hand in the wrongdoing found by the District Court.

There is, however, no prohibition to be found in the statute we construe in this case which prohibits retroactive seniority and, of course, the remedy for the wrong of discriminatory refusal to hire lies in the first instance with the District Judge. For his guidance on this issue we observe, however, that a grant of retroactive seniority would not depend solely upon the existence of a record sufficient to justify back pay under the standards of the Back Pay Section of this opinion. The court would, in dealing with job seniority, need also to consider the interests of the workers who might be displaced as well as the interests of the employer in retaining an experienced work force. We do not assume, as our brethern in the Fifth Circuit appear to (*Local 189, AFL-CIO, CLC* v. *United States*, 416 F.2d 980, *cert. denied*, 397 U.S. 919 (1970)), that such reconciliation is impossible, but as is obvious, we certainly do foresee genuine difficulties. *See also Jurinko* v. *Edwin L. Wiegand Co.*, 477 F.2d 1038 (3d Cir.), *vacated*, 414 U.S. 971 (1973), *reinstated*, — F.2d —, 7 FEP 787 (3d Cir. 1974). *Cf. Local 189, supra; Franks* v. *Bowman Transportation Co.*, 495 F.2d 398 (5th Cir. 1974).

On remand the District Judge may desire to hear the policy questions involved in this problem before remanding the individual claims to the Master. For purposes of that hearing notice should be given to the employees likely to be affected and intervention should be allowed from appropriate representatives.

What we have said concerning job seniority does not, of course, apply to the fringe benefits of employment. Where vacation schedules or pension rights (or other fringe bene-

fits) are determined by date of hire, we perceive no reason why that date in these cases should be other than the date which the trial court fixes as the date when the employee would have been hired, absent the illegal hiring practice which the District Court has identified and enjoined.

The Class

We affirm the determination of the class as set forth in the District Judge's opinion and order, except that membership therein should also be allowed to applicants between April 1, 1971, and January 26, 1973, when the 150 lb. rule was enjoined. We find no abuse of discretion in the District Judge's refusal to accept an amendment to this complaint so as to add to the problems of these plaintiffs and this plant (the Kentucky Truck Plant) the problems of applicants for employment at the Grade Lane Auto Assembly Plant. No present plaintiff applied for or was refused employment at the Grade Lane plant, and we do not perceive that reversal is mandated in the interests of judicial economy. Hopefully this case will supply applicable precedent if indeed the same practices prevailed at Great Lane.

Attorney Fees

We likewise find no abuse of discretion in the District Judge's award of attorney fees covering the work performed up to the dates considered by him. The case has, however, required additional legal services thereafter both in the District Court and on appeal which were not dealt with by his judgment. We therefore vacate the fee portion of the judgment and remand this aspect of the appeal for further consideration.

The judgment of the District Court is affirmed as modified above, and the case is remanded to the District Court for further proceedings consistent with this opinion. Costs to appellants.

APPENDIX B

Judgment—Entered December 12, 1973

Pursuant to Findings of Fact and Conclusions of Law entered on August 23, 1973, it is hereby ordered, adjudged and decreed that:

1. The Findings of Fact and Conclusions of Law entered by the Court in this Action on August 23, 1973, are hereby incorporated herein by reference, as if fully copied herein.

2. There are thirty-one (31) members of the Class represented by the Plaintiff in the instant action; the names, addresses and telephone numbers of the said members of the class are attached hereto and made a part hereof as if fully copied herein.

3. The use by the Defendant under the circumstances before the Court of the 150 pound weight requirement for eligibility for employment on its production line at its Kentucky Truck Plant constitutes an unlawful employment practice pursuant to the terms of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1 et seq.

4. Neither the Plaintiff nor any member of the class is entitled to any award of damages. Plaintiff is awarded its costs herein expended and counsel fees in the sum of $11,500.00.

5. The Defendant, Ford Motor Company, be and hereby is permanently enjoined and prohibited from applying the 150 pound weight requirement for eligibility for employment on its production line at its Kentucky Truck Plant.

6. The names of the Plaintiff and the thirty-one (31) members of the class represented by the Plaintiff shall be placed by the Defendant in a priority employment pool in the order of the dates of their original application for production employment. The names of all other applicants for production employment are to be placed in a general pool in accordance with the present practice of Defendant. As production employment positions become available,

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Defendant shall select names from the two pools of applicants at a set ratio of one name from the priority pool for every three names from the general pool, and these individuals are to be notified by the Defendant of the job openings as they occur and given a reasonable opportunity to appear for a pre-employment physical examination and the other processes regularly required of such applicants.

7. Individuals from the priority pool called pursuant to this procedure are entitled to no preference in regard to regularly applied job requirements, and said individuals must meet other regularly applied employment requirements of the Defendant before production employment must be granted them by the Defendant.

8. The procedure outlined above shall be followed by the Defendant until all names in the priority pool have been exhausted, or until the expiration of 18 months from the date of this Judgment, whichever first occurs.

9. The three-to-one ratio established above in no way implies the defendant must, as a matter of general practice, employ one female for every three males employed for production work, nor does this Judgment mean that the defendant must establish a ratio of any type regarding the employment of males and females for such production work in the future.

10. This Court shall retain jurisdiction of this action for a period of 18 months following the entry of this Judgment to insure the continued implementation of what now appears to be the defendant's policy of equal employment opportunities at its Kentucky Truck Plant.

It is Further Ordered that this action is dismissed with prejudice as to the defendant, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 862.

(s) CHARLES M. ALLEN
United States District Judge

December 11, 1973
cc: Counsel of Record

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 74-1258
74-1259

DELORES MARIE MEADOWS, *Plaintiff-Appellant, Cross-Appellee,*

v.

FORD MOTOR COMPANY, *Defendant-Appellee, Cross-Appellant,*

LOCAL 862, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND IMPLEMENT WORKERS OF AMERICA; and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *Defendants-Appellees.*

Before: EDWARDS and MILLER, Circuit Judges, and McALLISTER, Senior Circuit Judge.

Judgment

APPEAL from the United States District Court for the Western District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed as modified and the case is remanded for further proceedings.

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It is further ordered that Plaintiff-Appellant, Cross-Appellee recover from Defendant-Appellee, Cross Appellant, the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

ENTERED BY ORDER OF THE COURT.

/s/ JOHN P. HEHMAN
Clerk

Filed Jan. 24, 1975

Issued as Mandate:

COSTS: To be recovered by Appellant, Cross-Appellee

Filing fee	$ 50.00
Printing	$2,034.59
Total	$2,084.59

APPENDIX D

Nos. 74-1258-59

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DOLORES MARIE MEADOWS,
Plaintiff-Appellant, Cross-Appellee,

v.

FORD MOTOR COMPANY,
Defendant-Appellee, Cross-Appellant,

LOCAL 862, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA; and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *Defendants-Appellees.*

Order

Before: EDWARDS and MILLER, Circuit Judges, and MCALLISTER, Senior Circuit Judge.

On receipt and consideration of a petition for rehearing and suggestion for rehearing in banc filed by defendant-appellee, Ford Motor Company; and

On receipt of a motion to be allowed to file a petition for rehearing out of time filed by defendant-appellee, Local 862, International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America; and

Noting nothing in said petition and said motion which was not adequately considered and dealt with by the court in its previous opinion,

Said petition and said motion are hereby denied.

Entered by order of the Court

JOHN P. HEHMAN
Clerk

Filed March 24, 1975

APPENDIX E

(New York Times, Jan. 13, 1975, p. 43)

G.M. SUIT FOCUSES ON SENIORITY ISSUE

Preferentially Hired Women Workers Seek to Keep Their Jobs as Layoffs Spread in the Business Slowdown

BY HENRY WEINSTEIN
SPECIAL TO THE NEW YORK TIMES

San Francisco, Jan. 12—A Federal court lawsuit alleging sex discrimination at the General Motors Corporation assembly plant at Fremont, Calif., 40 miles south of here has brought into sharp focus the difficulty in maintaining the gains of Equal Employment Opportunity legislation in a period when the economy is depressed.

And the suit has raised again the problem of attempting to reconcile preferential hiring with hard-won union seniority rights during a business slowdown.

Tomorrow, 2,300 of the 4,466 assembly line workers at the plant will be laid off. All 441 women hourly production workers will be laid off because none of them has worked at the plant long enough to have the seniority needed to avoid a layoff.

There were no women hired to do assembly line work at this plant until 1968, four years after the passage of Title 7 of the Civil Rights Act, which prohibited hiring discrimination on the basis of race, religion, national origin or sex.

March Layoffs

In August, eight of these women sued General Motors alleging sex discrimination past and present. They were off in March along with a number of other workers and were not recalled until October. The suit seeks back pay and recall in addition to the work force at the plant for a number of women so that women would make up the same

percentage of the work force they did prior to layoffs in March.

It also asks that the plant "develop and implement an affirmative action program requiring population parity for women to be fully implemented within four years" and that women be given increased opportunity for promotion into skilled jobs.

Four of the women plaintiffs are white, two are black, one is a Chicano and one is a Blackfoot American Indian. All but one of them work on the second shift—4 P.M. to midnight— in semiskilled jobs. No woman had a skilled assembly line job at the plant at the end of 1973, according to the latest available statistics, and the plaintiffs contend this is still the case.

General Motors and the United Auto Workers have been the subject of an extensive Equal Employment Opportunity Commission investigation since 1973.

General Motors contends that a layoff system based on seniority is authorized by Title 7. It also says that in the 1964-68 period it "was precluded from employing women as assembly workers by the limitations of state protective laws for women," such as those prohibiting women from lifting heavy loads and working overtime.

The legislative history of Title 7 on seniority systems is far from clear, according to most authorities. Additionally, there have been two cases decided in Federal Appeals Court here that ruled that protective laws were not an adequate defense to discrimination in hiring on the basis of sex. These issues may be resolved when this case comes to a full trial on March 14.

On Friday, Federal District Judge Alfonzo J. Zirpoli refused to grant the plaintiffs a temporary injunction that would have prevented them from being laid off tomorrow and would have also compelled General Motors to keep 230

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women on the job in proportion to their percentage in the assembly line work force prior to layoffs.

The women, who are affiliated with a national organization called the Coalition of Labor Union Women, proposed four alternative remedies to the layoff problem.

¶ A "share the work" plan that would keep both assembly line shifts working at 20 hours a week with 36 hours' pay guaranteed to everyone with more than a year's seniority. It was stipulated that this would cost General Motors $26.9-million.

¶ Shifts work alternate weeks with unemployment benefits while off. This would cost the company $5.6-million.

¶ After the layoffs, the same percentage of women working at the plant now would be rehired. This would cost General Motors $3.3-million.

¶ Voluntary inverse seniority, with high-seniority men volunteering to go out and collect SUB pay (a benefit providing under the latest contract for 95 per cent of regular pay for a period of time depending on seniority), while women would have a chance to keep working longer. This would have cost the company $200,000.

The union opposed all of the women's four solutions on the ground they would violate seniority provisions as well as existing collective bargaining agreements.

There is a distinct possibility that the plaintiffs will ask to have the third remedy implemented at the full trial. This procedure is based on a Federal Court decision in Louisiana, called Watkins v. the Continental Can Company and the Steelworkers Union.

There, the judge ordered reinstatement and back pay for seven blacks laid off because of lack of seniority due to the company's previously discriminatory hiring practices, based on a formula that would help maintain their steady

percentage representation in the work force. The decision is now on appeal.

Judge Zirpoli seemed disposed toward the possibility of monetary remedies, which had been implemented in similar disputes in the past, rather than implementation of recall hiring that would give preference to women. But the ultimate decision in this case will come at the earliest in March and perhaps months or even years later.

SUPREME COURT, U.S.
FILED
MAY 27 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1349

LOCAL 862, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA - - - Petitioner

versus

FORD MOTOR COMPANY and DOLORES MARIE MEADOWS - - Respondents

On Petition For Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

---

BRIEF FOR RESPONDENT FORD MOTOR COMPANY IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1349

LOCAL 862, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA - - - - - - - - - - *Petitioner*

v.

FORD MOTOR COMPANY and DOLORES MARIE MEADOWS - - - *Respondents*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT FORD MOTOR COMPANY IN OPPOSITION

The Respondent, Ford Motor Company (hereinafter referred to as "Ford"), opposes the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

In addition to the opinions cited in and appended to the Petition, the District Court issued Findings of Fact and Conclusions of Law on August 23, 1973, discussing remedies. Those Findings and Conclusions are unreported and appear as Appendix A hereto.

COUNTERSTATEMENT

This class action was commenced by the Respondent, Dolores Meadows, on July 20, 1971. In her Complaint, Meadows alleged that the Defendants, Ford, the International Union and its Local 862 (the Petitioner herein), were guilty of unlawful discrimination against her and other females on the basis of sex, resulting in a violation of Title VII, 42 U.S.C. §2000e, *et seq.*

Shortly thereafter, the International Union and the Petitioner moved the District Court to dismiss them from the action. The International Union was dismissed on procedural grounds, while the Petitioner's motion was temporarily overruled. However, Petitioner continued to renew its motion to dismiss throughout the course of the litigation, and, in its final judgment of December 12, 1973, the District Court dismissed the action, with prejudice, as to the Petitioner.

In its Findings of Fact and Conclusions of Law entered on August 23, 1973 [App. A], which were made a part of the final judgment, the District Court concluded that the employment practice in question, while

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neutral on its face, was discriminatory in its effect on the class, and therefore violated Title VII. The District Court granted some affirmative relief by granting class members preferential consideration for future job openings. However, the District Court found that, in the particular circumstances of this case, no individual member of the class could prove that she had been personally affected by application of that employment requirement, and therefore that no member of the class was entitled to either backpay or retroactive seniority.

Consequently, the District Court never reached the question of how to fashion a seniority remedy; the District Court certainly did not reach the issue raised in the Petition of whether to require the employer to pay both discriminatees and affected long term employees in the event of a layoff. Indeed, the Petitioner was only a passive participant throughout the entire litigation in the District Court, making no suggestions to the Court as to alternative remedies for the alleged discrimination, and advancing no arguments at all as to the type of relief to which the Plaintiff or any member of her class might be entitled. Thus, the point which Petitioner seeks to present to the Court was mentioned by no one below.

Upon appeal by the Plaintiff to the Court of Appeals, the issue as to whether the Petitioner was properly dismissed was never raised by any of the parties in either the briefs submitted to the Court or in oral arguments. The Court of Appeals expressly stated that the appeal involved only the three issues raised

by the Plaintiff and did not involve the dismissal of Petitioner:

> The record showed that the two union defendants exercised no control over Ford hiring practices and the case as to them was dismissed by the District Court. No appeal was taken from this decision.
>
> * * * * * * *
>
> On this appeal we deal only with the plaintiffs' complaints (1) that the District Judge's judgment by refusing back pay and retroactive seniority failed to make them whole and failed to deter similar discrimination in the future, (2) that the District Judge defined the class of discriminatees too narrowly, and (3) that the attorney fees awarded did not consider all the work performed in this litigation. 510 F. 2d at 941, Appendix to the Petition at pp. 3a-4a.

Both the Plaintiff and the EEOC, as *amicus curiae,* filed briefs urging reversal of the District Court's denial of retroactive seniority, but not presenting the points raised by Petitioner here.[1] Petitioner, however, filed no brief in the Court of Appeals and, after the EEOC *amicus* brief was tendered, wrote a letter to the Clerk of the Sixth Circuit (appended hereto as Appendix B) stating that there was nothing in either Appellant's or *amicus'* briefs to which the union needed to respond. Although the Petition states that Petitioner participated in the oral argument, this over-

[1]Contrary to the assertion at page 5 of the Petition, the *amicus* brief was not filed after the due date of Ford's appellee's brief. In fact, Ford filed a separate brief in reply to the *amicus'* arguments on seniority and backpay.

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states what actually transpired. During the course of the argument before the Sixth Circuit, the Court inquired of Petitioner's counsel whether counsel had anything to say to the Court. Counsel responded that the Petitioner had been dismissed with prejudice below and that this dismissal had not been appealed or questioned, and counsel had nothing further to present to the Court.

The only question of seniority before the Court of Appeals was the District Court's holding that, on the facts of this case, the class members could not show they were entitled to either backpay or retroactive seniority. While the Court of Appeals reversed that judgment, it did not direct the District Court to award retroactive seniority. Nor did it reach the issue, now raised for the first time in the Petition, of granting retroactive seniority to discriminatees while preserving the seniority privileges of incumbent employees. The Court of Appeals merely followed the customary appellate practice of obtaining the views of the court below and remanded the case for further consideration of whether to award retroactive seniority:

> [O]f course, the remedy for the wrong of discriminatory refusal to hire lies in the first instance with the District Judge. For his guidance on this issue we observe, however, that a grant of retroactive seniority would not depend solely upon the existence of a record sufficient to justify back pay under the standards of the Back Pay Section of this opinion. The court would, in dealing with job seniority, need also to consider the interests of the workers who might be displaced as well as the

interests of the employer in retaining an experienced work force. We do not assume, as our brethren in the Fifth Circuit appear to (Local 189, AFL-CIO, CLC v. United States, 416 F. 2d 980, cert. denied, 397 U. S. 919, 90 S. Ct. 926, 25 L. Ed. 2d 100 (1970)), that such reconciliation is impossible, but as is obvious, we certainly do foresee genuine difficulties. *See also* Jurinko v. Edwin L. Wiegand Co., 477 F. 2d 1038 (3rd Cir.), vacated, 414 U. S. 970, 94 S. Ct. 293, 38 L. Ed. 2d 214 (1973), reinstated, 497 F. 2d 403, (3rd Cir. 1974). *Cf.* Local 189, *supra;* Franks v. Bowman Transportation Co., 495 F. 2d 398 (5th Cir.), cert. denied, 43 U.S.L.W. 3330, —— U. S. ——, 95 S. Ct. 625, 42 L. Ed. 2d 644 (1974) (No. 74-424).

On remand the District Judge may desire to hear the policy questions involved in this problem before remanding the individual claims to the Master.

510 F. 2d at 949, Appendix to the Petition at p. 20a.

Thereafter, both Ford and the Petitioner petitioned the Court of Appeals for rehearing; but Petitioner does not assert that its rehearing petition raised the argument now urged upon the Court, which it did not (the Union's Petition for Rehearing is attached hereto as Appendix C). When the rehearing petitions of Ford and Petitioner were denied, Petitioner filed its Petition herein which raised that argument for the first time in this litigation.

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ARGUMENT

Respondent respectfully submits that there are three independent reasons why the certiorari Petition should be denied in this case.

I.

First, Petitioner is no longer a party to this action. As the Court of Appeals' decision clearly shows, the District Court's dismissal of this action as to Petitioner was not appealed, and neither the Plaintiff, this Respondent nor Petitioner raised any objections whatsoever to the dismissal. The cases cited at page 10, footnote 3, of the Petition, *Banks* v. *Chicago Grain Trimmers Ass'n,* 389 U. S. 813; *Hunter* v. *Ohio ex rel. Miller,* 396 U. S. 879, are not analogous to the instant case. They are cases in which a nonparty, who was the real party in interest below, but whose interests had been represented by attorneys for governmental defendants, were allowed to intervene and petition for certiorari when the governmental defendants declined to petition. Accordingly, those cases do not alter the conclusion that a party previously dismissed from an action should not be permitted to reenter the case to seek review by certiorari. 28 U.S.C. 1254(1). The retention of Petitioner's name in the caption is the only remaining vestige of the Petitioner's connection with the case. But this is not sufficient to make Petitioner a party to this action when, on its own motion, it had been dismissed from the case with prejudice at the trial level, with no appeal taken from that order

of dismissal. Furthermore, Petitioner's inaction throughout this litigation makes its attempt to reenter the case now especially inappropriate.

II.

In addition, neither the argument which Petitioner is attempting to present to this Court, nor any similar argument, has ever been presented to either court below during the nearly four years of litigation that preceded the Petition. Consequently, if certiorari were granted in this case, this Court would not have the benefit of the lower court's views on Petitioner's arguments. Indeed, this Court apparently would not have the benefit of any lower court's views since Respondent is unable to locate any case in which Petitioner's arguments were presented and decided, and Petitioner has cited none. Accordingly, this is a classic case for applying the rule that "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 147 n. 2 (1970) and cases cited therein. *See, also, NLRB* v. *Sears, Roebuck & Co.*, —— U. S. ——, 43 U.S.L.W. 4491, 4500-01 (April 28, 1975); *Ramsey* v. *United Mine Wkrs. of Amer.*, 401 U. S. 302, 312 (1971).

III.

Finally, the interlocutory nature of the Court of Appeals decision in this case as to retroactive seniority makes it inappropriate to consider Petitioner's arguments at this time. The Court of Appeals has reversed

the District Court's conclusion that an award of back-pay and/or retroactive seniority is not justified in this particular case. However, the Court of Appeals has neither directed entry of such an award nor precluded such relief. Rather, the Court of Appeals merely directed the District Judge to take additional evidence and to give further consideration to the policy issues involved in deciding whether either of these remedial devices is appropriate in this case. Accordingly, the alleged conflict in circuits between *Franks* (No. 74-728) and this case on which Petitioner relies is non-existent. See the Petition, pp. 3, 7, 9 and 14. Indeed, this case is not yet ripe for review by this Court on the issue presented by the Petitioner. *See, e.g., Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R. Co.*, 389 U. S. 327 (1967).

CONCLUSION

For the foregoing reasons, Respondent Ford Motor Company respectfully submits that this Petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

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APPENDIX A

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

DOLORES MARIE MEADOWS,
Plaintiff,

v.

FORD MOTOR COMPANY, et al.,
Defendants.

Civil Action
No. 7005

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Entered August 23, 1973)

Findings of Fact

1. On July 20, 1971, plaintiff filed this action alleging violations of Title 7 of the Civil Rights Act, 42 U.S.C. 2000e-5, et seq.

2. Defendant Ford Motor Company Filed an answer denying any violations of the Act, and alleging many defenses to the cause of action asserted by the plaintiff.

3. The other defendants who were made parties to this action have since been dismissed since they have no control over Ford's hiring practices or job requirements.

4. Plaintiff applied for production employment at defendant's Westport Road Truck Plant, hereinafter referred to as the Kentucky Truck Plant, on October 10, 1969. She did not receive employment at the plant and filed a complaint against the defendant, Ford Motor Company, alleging discrimination, based on sex, with the Equal Employ-

ment Opportunity Commission, hereinafter referred to as E.E.O.C., on January 14, 1970. Defendant Ford was officially notified by E.E.O.C. of plaintiff's charge on February 2, 1971.

5. On July 1, 1971, E.E.O.C. issued its right to sue letter to plaintiff and 19 days later she brought suit. Discovery procedures initiated by the plaintiff and records furnished by the defendant Ford established the following facts:

A. Defendant had a 150 pound weight requirement for employees on its production lines at the Kentucky Truck Plant from October 10, 1969 to January 26, 1973.

B. The weight requirement was dropped on January 26, 1973 because this Court issued a preliminary injunction and partial summary judgment enjoining its continuance.

C. Although the defendant had the 150 pound weight requirement, it was not applied inflexibly to males and some males were employed who weighed more than 135 pounds but less than 150 pounds.

D. The defendant also maintained a personnel classification, wherein females were never classified "A" but were classified "B". That classification meant that a female is a smaller person, and that work suitable for a smaller person should be assigned to females. See deposition of Dr. Charles E. Allen, Jr., question and answer 115, p. 35. The deposition of Lawrence Wilson Tolliver, Labor Relations Representative for Ford, taken on July 21, 1972, is very indefinite as to whether or not this classification is still maintained by Ford. Regardless of this indefiniteness, it seems to be established that Ford does not rely on this classification in assigning applicants for employment to jobs at the present time, but relies on the recommendations of Dr. Allen, its examining physician.

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E. 82 females, in addition to plaintiff, applied for employment on the production line between the period October 10, 1969 and April 1, 1972. All of these females applied for employment during the period April 1, 1971 to April 1, 1972. No females were employed during this period, nor did any of them receive the physical examination required of all applicants for employment on the production line.

F. Ford made a scientific test to determine what relationship the 150 pound requirement had to the accomplishment of the task required on the production line.

G. Statistics offered by the plaintiff show that some 70 percent of women over 21 years of age weigh less than 150 pounds, and that 80 percent of men who are over 21 years of age weigh more than 150 pounds.

H. The records of Ford show that 935 males were employed on the production line during the period from October 10, 1969 to October 1, 1971.

I. The first female employee on the production line was hired on April 13, 1972. As of July 21, 1972 there were 3,300 employees on the production line, of whom 6 were females. During the six month period from August 1, 1972 to January 26, 1973, the defendant received 4,959 applications for employment, of which 373 were applications by females. Only 53 applicants were employed, and of that 5 of these applicants were females.

6. Ford has stated, as a defense to the action, that it participated in special hiring programs, such as employing disabled veterans, disabled persons and persons from various other laudable programs.

7. The Court, at this time, is not advised as to how many of the 82 female applicants for employment on the production line during the period October 10, 1969 to April 13, 1972 are still interested in employment. Inquiries will

be made by appropriate class action notices and the information will be in the hands of the Court by October 20th of this year.

8. The defendant's asserted practice with regards to employment on the production line is to hold the applications for ninety days, and then when a vacancy occurs to award it in chronological order to the first applicant who is qualified to fill the vacancy.

Conclusions of Law

1. The Court has jurisdiction of this action under the provisions of 42 U.S.C. § 2000e-5, et seq. and 28 U.S.C. § 1343(4).

2. Plaintiff timely filed her complaint with the E.E.O.C. on January 14, 1970, and timely filed her suit in this court on July 20, 1971, after permission to sue was given her on July 1, 1971 by E.E.O.C.

3. The 150 pound weight requirement imposed by the defendant, although neutral on its face, was discriminatory in its effect, in that no females were given a physical examination to qualify for employment during the period October 10, 1969 to April 1, 1972, and, further, in view of the fact that such requirements did exclude automatically some 70 percent of the women applying for employment because of their weight being below 150 pounds, whereas it gave some 80 percent of the males applying for employment an opportunity for employment, since that percentage averaged more than 150 pounds.

The establishment of policies or practices by an employer that are neutral on their face, but discriminatory in their effect, and that have no valid relationship to the accomplishment of the particular job, have been thoroughly condemned by the Supreme Court in *Griggs* v. *Duke Power Company,* 401 U. S. 424 (1971) and by the Seventh Circuit in *Bowe* v. *Colgate-Palmolive Company,* 416 F. 2d 711 (1969). The 150 pound restriction, as applied by the de-

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fendant, does not have a valid relationship to the ability of a person weighing less than 150 pounds to perform the task required of him and, therefore, does not constitute a bona fide occupational qualification, and, hence, defendant may not vindicate its policy by relying on that defense. See *Bowe* v. *Colgate-Palmolive Company, supra.*

4. The statistics, showing that the defendant did not employ any females on the production line, and did not even examine them for employment, entitled the plaintiff to judgment as a matter of law. See *Parham* v. *Southwestern Bell Telephone Company,* 433 F. 2d 421 (8th Cir. 1970).

5. The defense that the company asserts of hiring disadvantaged veterans and other persons who are worthy of employment because of special handicaps is not a valid defense to a charge of sex discrimination under the Act. See 42 U.S.C. § 2000e-2(e).

6. The Court, being unable to determine from the records when plaintiff or any members of her class would have been employed, had it not been for the discriminatory practices of the defendant, concludes that it is without authority to award any backpay or any monetary damages to plaintiff or any members of her class. The only cases in which backpay has been awarded to a potential employee, who was discriminated against and not employed, are those involving individual employees where it was definitely shown that they would have been entitled, on a date certain, to be employed and after computation could be made of the wages to which they were entitled. See *Gates* v. *Georgia Pacific Corporation,* 326 F. Supp. 397 (D.C. Ore. 1970). Any award of damages in this case, therefore, would be speculative and must be denied.

7. Since the Court has previously held this to be a class action, pursuant to Rule 23(b)(2), Federal Rules of Civil Procedure, and has mandated the sending of class action notices to those females who were denied employ-

ment between the period October 10, 1969 and April 13, 1972, the Court must also consider the matter of employment relief to be afforded those persons in the class who may indicate to the Court their desire still to be employed by Ford Motor Company. An exact formulation may not be made at this time, but after information has been received as to the number of persons who are entitled to relief, and who are interested therein, the relief to be granted will be based on principles enunciated in *Castro* v. *Beecher*, 459 F. 2d 725 (1st Cir. 1972), at pp. 736, 737 and 738.

8. Relief contemplated by the Court would be:

(a) that physical examination be afforded to all female applicants who are members of the class and still wish relief;

(b) that all such female applicants, who pass the physical examination and who are otherwise qualified, be placed in a priority pool;

(c) that a second pool be created out of the list of presently qualified applicants at Ford, both male and female;

(d) that whenever vacancies occur on the production line at the Kentucky Truck Plant one female from the priority pool be employed to every three from the second pool until the priority pool has been exhausted. The ratio of one to three set out by the Court is not considered by the Court to be binding on it, because at this time the exact number of persons in the class who are still interested in relief is not known.

As stated in *Castro* v. *Beecher*, supra, if the number in the priority pool is not large, this would enter into the Court's judgment in fixing a smaller ratio. While the *Castro* court does not explain what is meant by the term "large", it is pointed out that the district court should have discretion in fixing the priority pool procedures in such a way as to correct the inequities caused by the discriminatory effects of the past.

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Statistics afforded to the Court by the parties indicate that there are only 11 women employees on the production line out of more than 3,300 employees; whereas, the number of applicants during the most recent six months period brought to the Court's attention reflects a ratio of approximately 15 male applicants to every one female applicant. The priority pool method proposed here, when finally determined, will help eliminate such discriminatory effects.

9. Finally, the Court concludes it should retain jurisdiction of this action for a reasonable period of time to insure the continued implementation of what appears now to be Ford's policy of equal employment opportunities. See *Parham* v. *Southwestern Bell Telephone Company*, supra, at p. 429; and *United States* v. *Dillon Supply Company*, 429 F. 2d 800 (4th Cir. 1970). The Court holds that a period of 18 months following the entry of judgment should be sufficient to meet this purpose.

10. Plaintiff is awarded its costs herein expended and counsel fees in the sum of $11,500, as noted in a separate opinion of this Court.

11. This action will stand submitted for final judgment following the receipt by the Court of the information as to the number of employees of the class represented by plaintiff actually interested in securing employment at Ford Motor Company's Kentucky Truck Plant.

August 23, 1973

(s) Charles M. Allen
United States District Judge

cc: Counsel of Record

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APPENDIX B

May 20, 1974

CERTIFIED MAIL

Mr. James A. Higgins, Clerk
U. S. Court of Appeals
for the Sixth Circuit
U. S. Post Office and Court House
5th and Walnut Streets
Cincinnati, Ohio 45202

Re: Meadows v. Ford Motor Co., et al.
Nos. 74-1258, 74-1259

Dear Sir:

Please be advised that International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its Local Union No. 862, defendants-appellees in the above-captioned case, are not filing a brief in this matter because:

1. No mention is made of said Local or International either in Appellant's brief or Amicus' brief and, therefore, there is nothing to which the Unions can respond.

2. Even though an appeal was taken from all previous orders of the court including the dismissal of the International Union on October 13, 1971 (35a) because no charge was filed with the EEOC against the International; hence, under the doctrine of *Bowe* v. *Colgate Palmolive*, 416 F. 2d 711 (7th Cir. 1969) the International was not a proper party to the suit; and

3. The Complaint was dismissed as to the Local Union because the Local had absolutely nothing to do with the hiring practices of the Ford Motor Company (Sexton Affidavit at 282 and Tolliver Interrogatory at 122a-

123a). Therefore no issue of a material fact was presented; and

4. We write this letter after consultation with the Clerk's office rather than file a brief because of the above facts. We trust this procedure is acceptable to the Court and that this letter will be distributed to the panel along with the briefs of the other parties.

5. Counsel for the Unions desires to be notified when the case is set and to appear when the case is called.

Respectfully submitted,

SEGAL, ISENBERG, SALES & STEWART
(s) Herbert L. Segal

HLS/vc
CC: Mr. Edgar Zingman
Mr. Jon L. Fleischaker
Mr. James C. Hickey
Mr. Thomas L. Hogan

APPENDIX C

Nos. 74-1258
74-1259

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DOLORES MARIE MEADOWS - -	*Plaintiff-Appellant Cross-Appellee*
v.	
FORD MOTOR COMPANY - - - -	*Defendant-Appellee Cross-Appellant*
LOCAL 862, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA; and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA - - - - -	*Defendants-Appellees*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

PETITION OF APPELLEES UAW FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

SEGAL, ISENBERG, SALES & STEWART
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By: _____

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May it please the Court:

Appellee-Unions file this petition for rehearing because we believe that at least as to the seniority issue the Court's opinion is subject to misinterpretation and requires clarification. Succinctly stated there are three major points we wish to make:

1. The Court's observations as to constructive seniority are subject to at least two interpretations as will more specifically hereinafter be set out.

2. This issue was not fully briefed.

3. The Court should not rule on retroactive seniority now because, among other reasons, the issue of retroactive seniority is now before the United States Supreme Court on a petition for Certiorari in *Franks* v. *Bowman Transportation Co.*, 495 F. 2d 398 (5th Circuit 1974), 43 USLW 3431 (Feb. 4, 1975).

I. AMBIGUITY IN THE COURT'S OPINION

In its opinion this Court said:

> "There is, however, no prohibition to be found in the statute we construe in this case which prohibits retroactive seniority and, of course, the remedy for the wrong of discriminatory refusal to hire lies in the first instance with the District Judge." (Sl.Op. at 19).

However, the Court also said:

> "On remand the District Judge may desire to hear the policy questions involved in this problem before remanding the individual claims to the Master." (Sl.Op. at 19).

The first quoted sentence is subject to the possible interpretation, namely that the Court is explicitly ruling that Title VII does *not* proscribe retroactive seniority as a remedy for an alleged hire date discrimination by an employer:

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Conversely, the first quote implies that retroactive seniority for alleged hire date discrimination is one possible remedy. That the Court did not intend this sentence be so interpreted is suggested by the "On remand" quote.

We believe that this Court did not intend to rule on the retroactive seniority issue but intended instead to include that issue in its remand to the District Court. If the District Court rules that Title VII proscribes such a remedy, that issue would be laid to rest at the District Court. If, however, the District Court rules that Title VII does not proscribe such a remedy, then the District Court would determine what remedy is appropriate here.

II. AND III. ISSUE NOT FULLY BRIEFED HERE AND IS NOW BEFORE THE UNITED STATES SUPREME COURT

One of the reasons we believe that the Court should make clear that it has not ruled on this issue is that this issue was not squarely presented or fully briefed and argued. Moreover, the issue has been decided differently by two Courts of Appeal and is pending before the Supreme Court. See *Jurinko* v. *Edwin L. Wiegand Co.*, 477 F. 2d 1038 (3rd Cir.), vacated, 414 US 971 (1973), reinstated, ____ F. 2d ____, 7 FEP 787 (3rd Cir. 1974) and *Frank* v. *Bowman Transportation Co.*, supra.

The Fifth Circuit expressly ruled that Title VII proscribes retroactive seniority as a remedy in such cases. *Frank* v. *Bowman Transportation Co.*, supra. See also *Jersey Central Power and Light Co.* v. *EEOC*, (3rd Cir., Jan. 30, 1975) BNA Daily Labor Report, Jan. 31, 1975 (No. 22) E-1.

In *Jersey Central Power and Light Co.*, the Third Circuit said:

> "We thus conclude in light of the legislative history that on balance a facially neutral company wide sen-

iority system *without more*, is a bona fide seniority system and will be sustained even though it may operate to the disadvantage of females and minority groups as a result of past employment practices. If a remedy is to be provided alleviating the effects of past discrimination perpetuated by lay offs in reverse order of seniority, we believe such remedy must be prescribed by the legislature and not by judicial decree."

In sum, we ask this Court to:

1. Make clear that it has not ruled on the issue of whether Title VII proscribes retroactive seniority as a remedy for an employer's hiring date discrimination; and

2. Direct the District Court to rule on this issue.

Respectfully submitted,

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This is to certify that a copy of the foregoing was mailed this 11th day of February, 1975, to Hon. Ed Zingman, 2800 Citizens Plaza, Louisville, Ky. 40202 and Hon. James Hickey, Commonwealth Bldg. Louisville, Ky. 40202, and Hon. William Carey, EEOC, 1800 G Street NW, Washington, D.C. 20506.
(s) HERBERT L. SEGAL

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No. 74-1349

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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

LOCAL 862, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *Petitioner*

v.

FORD MOTOR COMPANY AND DOLORES MARIE MEADOWS

PETITIONER'S REPLY IN SUPPORT OF CERTIORARI

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The Ford Motor Company's suggestion that this Court postpone review of a remedial alternative disregarded by the Fifth Circuit in *Franks* and by the Sixth Circuit in this case, could irrevocably prejudice rights of employees and the development of Title VII law. If this Court should affirm in *Franks* then it is the "discriminatee" employees who lose. On the other hand, if this Court reverses *Franks* and merely grants retroactive seniority, then it is the "incumbent" employees who are prejudiced. In either instance, for lack of consideration of a remedial alternative which

protects both groups, some of the employees would be irrevocably injured.

Accordingly, there is nothing to the Ford Motor Co. plea that the issue should be dismissed as "interlocutory," for by that means the remedy we propose may be precluded by this Court's disposition in *Franks*. Nor can review be foreclosed by the failure of the court below to consider the "front pay" solution in its review of the seniority issue, for after this Court has decided *Franks* it would be too late to resuscitate the remedy which preserves the fair seniority claims of both the discriminatees and the incumbent workers.

Finally, it remains clear that the Union has every proper interest to present the issue to this Court. The Company has not effectively answered our demonstration (Pet. p. 10, n. 3) that the Union was captioned and given the status of a party in the proceedings below. In any event, this Court's *Banks* and *Hunter* precedents would clearly authorize the grant of leave for the filing of the pending petition. As the court below itself recognized (see Pet. p. 8), in the disposition of the pending seniority question "intervention should be allowed from appropriate representatives" of the employees likely to be affected. There is no more appropriate representative of both the discriminatee employees and the incumbent workers than petitioner—the Union which is their statutory bargaining representative.

We are not surprised by the Company's zeal to prevent this Court's consideration of a remedy whose burden will fall on the wrongdoing employer rather than his workers. But we continue to submit that review should be granted for consideration of another and

better solution to the seniority rights problem pending in *Franks*.

Respectfully submitted,

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CERTIORARI DENIED